IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 31ST MAY 2007 / 10TH JYAISHTA 1929

SA.No. 578 of 1993(B)

AGAINST THE JUDGMENT AND DECREE IN AS.17/1988 of SUB COURT, HOSDRUG DT.29.3.99.

AGAINST THE JUDGMENT AND DECREE IN OS.128/1984 of MUNSIFF COURT, HOSDRUG DT.31.8.87

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APPELLANT: APPELLANT/ PLAINTIFF

CHEPPAYIKKOTH MADATHIL UNNIKRISHNAN NAMBISSAN,
S/O.VISHNU NAMBISSAN, NELLIKKUNNU OF
KASARAGOD KASBA VILLAGE,
P.O.KASARAGOD, KASARAGOD TALUK, DISTRICT.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.K.MOHANA KANNAN

RESPONDENTS: RESPONDENTS/ DEFENDANT

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1. **MELLIAM THEKKE VEETTIL DAMODARAN NAMBIAR,**
   S/O.LAKSHMI AMMA, RESIDING AT THADIKKADAVU
   AMSOM, THIMIRI DESOM , TALIPARAMBA TALUK,
   P.O. CHITTADIL, VIA ALAKKODE.

2. **MELLIAM THEKKE VEETTIL YESODHA AMMA,**
   D/O.LAKSHMI AMMA, RESIDING AT
   KIZHAKKAN KOVVALIN NILESHWAR VILLAGE,
   HOSDRUG TALUK, P.O.NILESHWAR.

3. **MELLIAM THEKKE VEETTIL BALAN NAMBIAR,**
   S/O.LAKSHMI AMMA, RESIDING AT THADIKKADAVU AMSOM
   THIMIRI DESOM, TALIPARAMBA TALUK,
   P.O. CHITTADI (VIA) ALAKKODE.

4. **MELLIAM THEKKE VEETTIL SHANKARANKUTTY NAMBIAR,**
   S/O. LAKSHMI AMMA, RESIDING AT THADIKKADAVU AMSOM,
   THIMIRI DESOM, TALIPARAMBA TALUK,
   P.O.CHITTADI, VIA ALAKKODE.

5. **MELLIAM THEKKE VEETTIL NARAYANI AMMA,**
   D/O.LAKSHMI AMMA, RESIDING AT PALLATH
   NELLIKKUNNU OF KASARAGOD VILLAGE,
   P.O. KASARAGOD.

**6. MELLIAM THEKKE VEETTIL KUNHIKANNAN NAMBIAR,
S/O.LAKSHMI AMMA,
RESIDING AT 3 MADRAS, C/O.56 A.P.O. AND NOW
RESIDING AT VALIYEDAM HOUSE,
CHOOLIYAD P.O., MALAPPURAM,
VIA SREEKANDAPURAM.**

**7. MELLIAM THEKKE VEETTIL JANAKI AMMA,
D/O.LAKSHMI AMMA, RESIDING AT PALLATH HOUSE,
NELLIKKUNNU OF KASARAGOD KASBA VILLAGE,
P.O. KASARAGOD.**

**8. KUNIYIL PAYYAN PADMANABHAN,
S/O. K.R. KUNHIKANNAN, RESIDING AT KISHAKAN
KOVVAL IN NILESHWAR VILLAGE OF HOSDRUG TALUK,
P.O. NILESHWAR.**

**BY ADV. SRI.K.RAMAKUMAR - R6
SRI.E.VENUGOPALAN NAYANAR - R8
SRI.J.M.H. JOHN DAVID - R2**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 31 / 05 / 2007 , THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

ORDER ON CMP. NO.1397/1993 IN SA. NO.578/1993

DISMISSED

31.05.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 578 OF 1993
& CROSS OBJECTION

Dated 31st May 2007

J U D G M E N T

Plaintiff in O.S.128 of 1984 on the file of Munsiff court, Hosdurg is the appellant. Respondents are defendants. Respondents 1 to 7 are legal heirs of deceased Govindan Nair. Case of appellant was that under Ext.A1 agreement for sale Govindan Nair after receiving Rs.4,500/- towards sale consideration agreed to sell his half share in the plaint schedule property in his favour on or before 31/3/1982 and even though appellant was ready and willing to get the sale deed executed, after paying the balance consideration of Rs.500/- Govindan Nair did not execute the same and he died in May 1981 leaving behind respondents 1 to 7 as legal representatives and therefore he is entitled to get a decree for specific performance of the agreement for sale. 8th respondent was subsequently impleaded, as Govindan Nair had transferred his right in favour of 8th respondent under Ext.B1 sale deed subsequent to Ext.A1

sale deed. It was contended that Ext.B1 sale is not valid and binding on appellant as it was subsequent to Ext.A1 agreement. Respondents 2, 6 and 8 filed separate written statements. Second respondent contended that Ext.A1 agreement is not genuine and Govindan Nair was not physically competent to execute an agreement at that time and O.S.93 of 1977 was pending before Sub court, Kasargod and 8th respondent was impleaded in that suit as second plaintiff as an assignee of Govindan Nair and that suit was subsequently decreed and 6th respondent has instigated appellant to file suit and Ext.A1 was seen executed when Govindan Nair was an inpatient of Government Homeopathic Hospital, Nileshwar. 8th respondent in his written statement contended that Ext.A1 is not genuine and Govindan Nair has assigned his rights in favour of 8th respondent under Ext.B1 as he got impleaded in O.S.50 of 1981, a suit for partition and a decree was passed and appellant is not entitled to any relief. Learned Munsiff framed necessary issues. Ext.A1 was sent to finger print expert, Thiruvananthapuram and Ext.C1 report was obtained to the effect that thumb impression in Ext.A1 is similar to the thumb impression of deceased Govindan Nair in Ext.X1 (original of Ext.B1). Appellant

was examined as PW1 and attesting witness to Ext.A1 agreement was examined as PW2 and handwriting expert was examined as PW3. Exts.A1 to A4 and C1 to C2(d) were also marked. On the side of respondents, 8th respondent was examined as DW1 and Exts.B1 to B4 and X1 were marked. Learned Munsiff on the evidence held that Ext.A1 agreement was executed by Govindan Nair after receiving Rs.4,500/- as part of sale consideration of Rs.5,000/- and it is a genuine agreement for sale. But holding that Govindan Nair had sold the property in favour of 8th respondent under Ext.B1 on 29/4/1981 and 8th respondent is a bonafide purchaser without notice, learned Munsiff held that appellant is not entitled to get a decree for specific performance of agreement for sale as property has already been sold by Govindan Nair before institution of the suit. Suit was therefore dismissed. Appellant challenged decree and judgment before Sub court, Hosdurg in A.S.17 of 1988. Learned Sub Judge on re-appreciation of evidence confirmed the finding of learned Munsiff that Ext.A1 is a genuine agreement for sale executed by Govindan Nair. Learned Sub Judge also confirmed the finding that Govindan Nair had received advance amount of Rs.4,500/-. Though finding that appellant is not entitled

to a decree for specific performance of the agreement for sale as the property has already been sold by Govindan Nair to 8th respondent and 8th respondent is bonafide purchaser without notice and appellant is not entitled to decree for specific performance of agreement for sale was confirmed, learned Sub Judge found that appellant is entitled to get back the advance amount of Rs.4,500/- paid under Ext.A1 to Govindan Nair with interest at 6% from the date of the suit from the estate of Govindan Nair which vested with legal heirs. But learned Munsiff held that appellant is not entitled to a decree against 8th respondent. A decree was granted in favour of appellant to realise Rs.4,500/- with 6% interest from the date of suit till realisation from the estate of Govindan Nair with respondents 2,3,5 and 7, as appellant had relinquished his claim against the estate with respondents 1 and 4. Said decree is challenged by plaintiff in the second appeal.

2. Respondents 3, 5 and 7 did not challenge the decree granted by learned Sub Judge. A cross objection was filed by respondents 2 and 8 contending that courts below should have found that Ext.A1 agreement was not executed by Govindan Nair out of his free will and

volition and at the time of its execution he was hospitalised and therefore Govindan Nair could not have executed Ext.A1 agreement for sale. It was also contended that deceased Govindan Nair had a wife Kalyani at that time of his death and she had filed O.S.58 of 1988 before Sub court, Hosdurg for partition and in such circumstance, no decree could have been passed against second respondent as a legal heir of Govindan Nair.

3. Appeal was admitted formulating the following substantial questions of law.

> 1) When courts have found that Ext.A1 agreement for sale was genuine is not the appellant entitled to a decree for specific performance of the agreement for sale, when he has always been ready and willing to perform his part of the contract.
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> 2) Whether appellant is not entitled to get charge decree over plaint schedule property for the advance amount paid in view of Section 55 (6) (b) read with Section 100 of Transfer of Property Act.
>
> 3) Whether interest awarded by first appellate court is proper.

4. Learned counsel appearing for appellant and respondents 2 and 8 were heard.

5. Though learned counsel appearing for respondents 2 and 8 argued that Ext.A1 agreement is not genuine and it was not executed by Govindan Nair as he was hospitalised at that time and therefore not valid and binding, trial court and first appellate court on appreciation of evidence found that Ext.A1 agreement was executed by Govindan Nair after receiving the advance amount of Rs.4,500/- towards the sale consideration as shown therein and it is a genuine agreement for sale. Govindan Nair died much before institution of suit. Respondents 1 to 7 were impleaded as legal heirs of Govindan Nair. Givindan Nair did not leave behind any wife or children. It was contended by respondents that Ext.A1 was not executed by Govindan Nair. As thumb impression of Govindan Nair found in Ext.A1 was disputed, court below sent Ext.A1 to Forensic Science Laboratory, Thiruvananthapuram to get it examined by the expert with the thumb impression seen in Ext.X1 which is admittedly that of Govindan Nair. PW3 finger print expert examined Ext.A1 with the admitted thumb impression in Ext.B1 registered sale deed dated 29/4/1981 executed by Govindan Nair in favour of 8th respondent. It was found by PW3 that thumb impression seen in Ext.A1 is that of

Govindan Nair as seen in Ext.X1 the original of Ext.B1. Learned Munsiff and learned Sub Judge found that when PW3 was examined, his evidence was not at all challenged. So also, PW2 scribe was examined to prove the execution and his evidence was also not challenged. Courts below on the evidence therefore held that Ext.A1 was executed by Govindan Nair. Though it was argued that Govindan Nair was hospitalised at the relevant time and therefore Ext.A1 was not genuine, no evidence was adduced in support of that plea. In such circumstance, both the courts rightly found that Ext.A1 was executed by Govindan Nair and it is a genuine agreement for sale.

6. Then the only question is whether appellant is entitled to a decree for specific performance of the agreement for sale. Both the courts have found that appellant is not entitled to decree for specific performance of agreement as under Ext.B1, property was sold by Govindan Nair before institution of the suit in favour of 8th respondent. Evidence establish that Ext.A1 agreement was not known to 8th respondent before he purchased the rights under Ext.B1 sale deed executed by Govindan Nair. In such circumstance, both the courts have found that appellant is not entitled to get a decree for

specific performance of agreement for sale. There is no error in that findings.

7. In such circumstance, first appellate court held that appellant is entitled to get back the advance amount of Rs.4,500/- paid to Govindan Nair. Learned Sub Judge also held that appellant is entitled to get that amount from the estate of Govindan Nair left behind with respondents 1 to 7. Though cross objection was filed by respondents 2 and 8 contending that O.S.50 of 1981 is pending before Sub court, Hosdurg which was a suit by a third party claiming to be daughter of Govindan Nair and therefore appellant is not entitled to get a decree as against second respondent, no personal decree as against second respondent was granted. A decree was granted as against second respondent only in respect of the property left by Govindan Nair with second respondent. If second respondent is not a legal heir and no property of Govindan Nair vested with second respondent, second respondent need not have any grievance at all. If any of the estate of Govindan Nair vested with second respondent as his legal heir, appellant is entitled to realise the decree as against that property. The cross objection is without any merit and is

dismissed.

8. Then the question is whether appellant is entitled to get a charge decree as against the property covered under Ext.A1 sale deed. Learned counsel appearing for respondents 2 and 8 argued that 8th respondent is a bonafide purchaser without notice and as the property was purchased by 8th respondent before institution of suit, appellant is not entitled to get a charge decree as against property. Learned counsel appearing for appellant relying on decision of Division Bench of this court in **Sebastian v. Bipin (2004 (1) KLT 159**) and decision of Supreme court in **Delhi Development Authority v. Skipper Construction Co. (P) Ltd & Ors. (2000 (1) Supreme 105**) argued that appellant is entitled to get a decree as against the property, even if 8th respondent has purchased property without notice.

9. The Division Bench of this court considered exactly this question in Sebastian's case (supra). Following decision of Apex court in Delhi Development Authority's case (supra) where it was held that in the absence of a contract to the contrary buyer will have a charge on the seller's property which is the subject matter of sale agreement as provided under Section 55 (6)

(b) of Transfer of Property Act this court held that even as against bonafide purchaser without notice, plaintiff is entitled to get charge decree over the property agreed to be sold as there is a statutory charge provided under Section 55 (6) (b) of Transfer of Property Act. In such circumstance, appellant is entitled to get a charge over plaint schedule property. As it was not granted by learned Sub Judge, the decree is to be modified to that extent. Though learned counsel appearing for appellant argued that interest of 6% granted by first appellate court is insufficient and therefore enhanced interest is to be awarded. There is no agreement between the parties enabling appellant to claim enhanced interest. Ext.A1 does not provide for any payment of interest. So also, admittedly it is not a commercial transaction. Therefore, subsequent to the date of decree appellant is only entitled to get interest at 6% per annum. From the date of suit, also in the circumstance of case, appellant is only entitled to get 6% interest.

10. In the result, second appeal is allowed in part. Decree granted by first appellate court is modified providing that appellant/plaintiff is entitled to get a charge decree on the plaint schedule property which is

subject matter of Ext.A1 agreement for sale to the extent of rights of Govindan Nair in addition to decree for realisation of the amount from the property of deceased Govindan Nair which is available with respondents 2,3 and 5 as his legal heirs.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.578 OF 1993

31st May 2007

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